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# Supreme Court of the United States

OCTOBER TERM, 1957

No. 390

RAFAEL RIVERA, Petitioner,

*v.*

JAMES P. MITCHELL, Secretary of Labor,

*and*

APPEALS BOARD OF THE EMPLOYEES COMPENSATION BUREAU, Respondents.

## PETITION INCLUDING BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully shows:

### Opinions of Courts Below.

The Court of Appeals rendered no opinion herein except its Per Curiam decision dated May 29, 1957 which is contained in the certified record filed with petition, and a copy of which is annexed hereto. It does not discuss any of the points involved and presented.

The U. S. District Court rendered no opinion except that its order dismissng the complaint contains a statement that the Court "lacks jurisdiction of the subject matter of the action in that there is no justiciable right which could support application for the relief sought". Said order is printed at Appen. p. 44 of the record on appeal.

## Jurisdiction of This Court

The date of the judgment to be reviewed is May 29, 1957.

The jurisdiction of this Court is provided in Title 28 secs. 1254, 2101 of the U. S. Code.

## The Questions Presented For Review are as Follows:

The petitioner shipped as a seaman with the U. S. Lines Co. a private shipping company, under a shipping articles contract dated Mar. 27, 1942, duly signed by the ship Captain and the petitioner and the rest of the crew. Under the terms of said shipping articles contract the U. S. Lines Co. duly paid to the seaman as parts of his contracted bonus and wages, insurance of $5,000 for being totally disabled by enemy action; and $577.50 as maintenance as an out-patient after long treatment in a hospital; and $624.17 as wages back to home port after he was injured.

The Appeals Board of the Employees Compensation Bureau deducted from workmen's compensation found by it to be due to the seaman from the United States under the U. S. Employees Compensation Act of Sept. 7, 1916, said 3 items of his insurance and wages which had been contracted for and paid by the shipping company (the U. S. Lines Co.) as wages paid for his services rendered before the date of his injury, which was Sept. 14, 1942.

1. The Appeals Board had no jurisdiction over said 3 items of insurance and wages earned, and paid by the

shipping company, for services rendered in full before the injury of the seaman, to deduct them from workmen's compensation due to him under the Act of 9/7/1916.

2. That said wages (including insurance) were not workmen's compensation under said act. And they were paid by the employer, the shipping company, as fully earned under contract, and not paid by the United States. And if they had been paid by the U. S. for such services rendered under contract before the injury, they would not be workmen's compensation to be deducted from it.

3. That the Appeals Board deprived the petitioner of said insurance and wages, and deprived him of property without due process of law, contrary to Article V of the U. S. Constitution.

4. The Appeals Board acted without jurisdiction, and its acts are subject to judicial review because of that. *Amer. School* v. *McAnnulty*, 187 U. S. 94; *Soc. Sec. Brd.* v. *Nierotko*, 327 U. S. 358.

5. As a separate sufficient and reversible matter: That there is no statutory exclusion of Court review in this case (and if there were, it would not exclude Court review of acts done outside of the jurisdiction of the Appeals Board).

Section 42 of the Compensation Act of 9/7/1916, 39 Stat. 750, and its amendments deals exclusively with matters occurring outside of the United States, and with claims of noncitizens and nonresidents. This is also shown by the title of said section 42, which reads: "Employees of Canal Zone Government, Panama Canal Company, and Alaska Railroad; appeals; application to noncitizen and nonresident employees" (U. S. C. Title 5, sec. 793). The Act of July 28, 1945 (59 Stat. 503), amended said section 42 "by adding at the end thereof the following new paragraph". Said amending new paragraph is long. It deals exclusively with matters occurring outside of the U. S.

and with claims of noncitizens and nonresidents. Said amending new paragraph provides that where compensation is payable to employees of the U. S. "who are neither citizens nor residents of the United States" * * * for disability or death * * * at the place outside of the United States * * * where such employees may be working at the time of the injury", the Commission may change the amounts payable so as to fit the Local custom, and may change the beneficiaries, and may appoint a substitute to act for the Commission in such cases, and that under certain conditions the Commission may "waive the application of this Act." This is all expressed as limited to the "claims of such noncitizens and nonresidents". In other words said Act of 7/28/45 gives the Commission the fullest discretion in applying the Compensation Act when, and only when, the claims are by persons who are both noncitizens and nonresidents and the injury occurred outside of the U. S. And in that connection the said Act of 7/28/45 provides that "The action of the Commission or its designees in allowing or denying any payment under this Act shall be final and conclusive * * * and not subject to review by * * * any court". The judgment to be reviewed has held that said exclusion of court review (which properly applies only to claims of noncitizens and nonresidents based on injuries occurring outside of the U. S.) applies to any and every act of the Appeals Board, and that any decision by it under the whole, very meticulous Compensation Act of 9/7/1916, and its amendments, is not subject to court review. The codifiers of the U. S. Code, Title 5, sec. 793, have made very extensive changes in the language of the Act of 7/28/45 so as to make said exclusion of court review apply to any act of the Appeals Board under any part of the whole Compensation Act. They have stricken out the above words "under this Act" from said Act of 7/28/45, and have substituted for them the words "under sections 751-756, 757-791 and 793 of this title". This changes and perverts the sense and the language

of said Act of 7/28/45. But it is clear that the statute at large is the law and not the changes made by the codifiers (U. S. C. Title 1, secs. 112, 204). The true meaning of the amending act of 7/28/45 clearly is that the exclusion of Court review applies only to the very broad discretionary powers granted by said act itself, with respect to claims of noncitizens and nonresidents and to injuries occurring outside of the U. S. This court should correct that error.

The Act for Judicial Review of Agency Action (5 U. S. C. 1009, 60 Stat. 243, sec. 10), provides for very full court review "except so far as (1) statutes preclude judicial review, (2) agency action is by law committed to agency discretion". That on the admitted facts in the present case there is no such statutory preclusion of court review, and no such commission to agency discretion.

6. That the Appeals Board also had no jurisdiction to refuse, wholly, to appraise the value of the seaman's subsistence and quarters so as to include that value in his monthly pay base before the injury, for compensation purposes (Appen. 21). It refused to follow the statute, and appraise that value. U. S. C. Title 5, sec. 762.

## The Statutes and Constitutional Provisions Involved are as Follows:

Act for Judicial Review of Agency Action, Sec. 10, 5 U. S. C. 1009, 60 Stat. 243.

Act of July 28, 1945, 59 Stat. 503; 5 U. S. C. 793. But erroneously codified therein.

Fed. Employees Compensation Act, sec. 7, as amended, 5 U. S. C. 757.

Fed. Employees Compensation Act, sec. 2, as of 9/7/1916, 39 Stat. 743.

Fed. Employees Compensation Act, sec. 762, 5 U. S. C. 762.

U. S. Constitution Art. V.

## A Concise Statement of the Case Containing the Facts Material to the Consideration of the Questions Presented is as Follows:

The petitioner (a U. S. Citizen) was a merchant seaman before he was totally disabled by enemy action on Sept. 14, 1942. At that time the ship (S.S. Nathaniel Greene) loaded with war equipment was N. E. of England and approaching Russia, and the petitioner was doing ordered duty on the gun deck in passing ammunition and helping an anti-aircraft gunner.

The U. S. Lines Co. was then, and still is, a privately owned shipping company, which then owned and operated the S.S. Nathaniel Greene. The U. S. Lines Co. was not a part of the United States. It was and is a distinct and separate entity.

On Mar. 27, 1942, the petitioner, Rivera, at the port of N. Y. engaged as a seaman on the Nathaniel Greene, by duly signing the shipping articles with the Captain and the rest of the crew. The shipping articles were in the usual form of contract except that they provided by a large display rider attached to the big sheet:

"It is further agreed that war bonus payments and insurance will be paid in accordance with decisions of the Maritime War Emergency Board" (Appen. 2, 14).

The Maritime War Emergency Board was not a part of, or a representative of, the United States. It was a Board which had been appointed under a written contract made and signed by the maritime labor unions and the shipping companies, including Rivera's union, the N. M. U. from whose hiring hall be signed on, and the U. S. Lines Co. whose captain signed the shipping articles with Rivera and the rest of the crew.

The appointment and function of said Board was as follows: On Dec. 18, 1941, the U. S. had just entered the

World War II, against Japan on Dec. 8, 1941, and against Germany on 12/11/41. The maritime labor unions and the shipping companies had not been able to settle by an agreement the terms of the war wages which the shipping companies should contract to pay the seaman. The merchant seamen were serving on ships which carried war equipment to Russia and Europe thru the blockade by Germany and many ships and seamen were being lost and injured. The war wages for working on the ships were to be paid in the form of the both voyage war bonus and port war bonus, and insurance against bodily injuries or death suffered by enemy action. After conferences the unions and the shipping companies drew up and signed a written contract dated Dec. 18, 1941, entitled "Statement of Principles". It provided, that the seamen did not waive the right to strike; that to prevent interruption of service, a Maritime War Emergency Board should be appointed of 3 disinterested persons to fix as an arbiter the war bonus payments and the insurance against injury by enemy action, which the shipping companies should contract to pay, and pay, as wages, on account of the very dangerous work (Appen. 15, 19, Br. in record 9).

At the request of the unions and shipping companies, and pursuant to that written contract of Dec. 18, 1941, the President of the U. S. by an order dated Dec. 19, 1941 appointed 3 disinterested persons, Steelman, Macauley and Graham, to act under said contract and fix the war bonuses and war insurance which the shipping companies should pay, and the seamen should receive, as that part of their contract wages. Said order and said contract are recorded in the U. S. Fed. Register and in the U. S. Code of Fed. Regulations (Appen. 15, 19).

Said Board by an order dated Jan. 10, 1942 fixed the voyage and port bonuses under which Rivera was paid $833.13, as that part of his wages, covering the time before he was injured on Sept. 14, 1942 (Appen. 19-20). That part of his wages was not set-off from the Compensation

by the Appeals Board. It is pointed out here because the provision for those war bonus payments is contained in the same clause and paragraph of the shipping articles contract which provides for the insurance, which latter the Appeals Board set-off from compensation.

Said Board by 2 orders dated Dec. 22, 1941 and Feb. 6, 1942, provided and set-forth in complete detail, and signed, by each of the 3 members, a very complete and extensive form of insurance policy. Under that insurance policy the Board's order of 12/22/41 provided that "each member of the crew of any merchant vessel * * * covered by the Statement of Principles pursuant to which the Board has been established * * * shall be insured" (Appen. 15). Said insurance policy provides for payment of $5,000 in case a seaman was totally disabled by enemy action (Appen. 18). In the present case that insurance was required to be by the shipping company as part of the wages expressly contracted for in the shipping articles on 3/27/42 as shown above.

The shipping company, the U. S. Lines Co. found and agreed that Rivera had been totally disabled under the contract. And it paid to Rivera the $5,000 of insurance provided for in the form of said insurance policy fixed by said Board. Said decision of total disability was made after Rivera had been treated in a hospital for months, and after he had been treated as an out-patient for months. The total disability was obvious. The greater part of the muscles and sinews at the left back and left shoulder had been torn away and lost, with a cutting and shattering of the bones of the left shoulder and left arm, and some of the bones had not healed together, and the whole was tightly bound into an enormous scar, practically preventing any use of the left arm, and making a permanent painful condition.

The shipping articles contract dated Mar. 27, 1942, in substance and effect, incorporated into itself said prior

orders of said Board, made as an arbiter, dated 1/10/42, 12/22/41, 2/6/42, fixing the war bonus payments and the war insurance against injury by enemy action, which the shipping articles provided for as insurance and wages, in the said paragraph of the same which reads "It is further agreed that war bonus payments and insurance will be paid in accordance with decisions of the Maritime War Emergency Board" (Appen. 2, 14).

Under the shipping articles contract Rivera was entitled to receive from the shipping company as bonus and wages of the contract:

1. Base wages of $87.50 per month.

2. Voyage and port bonuses.

3. In case of total disability by enemy action, $5,000 of insurance.

4. In case of injury, as a seaman, he was entitled to receive, hospital treatment, and maintenance as an out-patient while hospital treatment continued, and wages back to home port.

After Rivera was totally disabled by enemy action on Sept. 14, 1942, the shipping company paid to him as insurance, bonus and wages earned under the shipping contract prior to the date of his injury, 9/14/1942, all of the following:

1. His base wages of $87.50 per month.

2. His voyage war bonus and port war bonus, a total of $833.33.

3. His insurance against total disability by enemy action, $5,000.

4. Provided him with hospital treatment in British hospitals and on ships.

5. Paid him for maintenance as an out-patient in 1942-3, in N. Y. a total of $577.50.

6. Paid him his wages back to home port, as an injured seaman, a total of $624.17.

The Appeals Board took from Rivera all of said insurance bonus of $5,000. And all of said contracted for maintenance as an out-patient of $577.50. And all of said wages back to home port of $624.17. Said 3 items were all paid by the U. S. Lines Co. as insurance bonus and wages contracted for. They were all earned for services rendered wholly before the date of injury 9/14/42. They were paid as such insurance bonus and wages by the sole contracting employer, the shipping company, according to the shipping articles. But the Appeals Board deprived Rivera of said 3 items, by deducting the insurance and maintenance from compensation found by it to be due to the seaman under the Compensation act. And the item of wages back to home port the Appeals Board took from Rivera by making his compensation begin to run on Dec. 29, 1942 which was 3 days after Rivera was shipped back to N. Y. and not making his compensation begin to run on Sept. 17, 1942 which was 3 days after the date of the injury. The Compensation Act prescribed at that time that compensation should begin to run 3 days after the injury was received (Act of 9/7/1916, sec. 2, 39 Stat. 743). The Appeals Board had no jurisdiction to change the statute in that respect.

The Compen. Act, sec. 762, provides, that "the value of subsistence and quarters * * * shall be included in the pay". The Appeals Board refused to appraise the value of subsistence and quarters. It bluntly said "Neither the Bureau nor the Board determine the value of subsistence and quarters" (Appen. 5). The value of subsistence and quarters was at least $3.00 per day. The Appeals Board had no jurisdiction to refuse to appraise it.

That petitioner is entitled to compensation as a U. S. employee is admitted of record (Appen. 3-4). By the Act of 3/24/43, 57 Stat. 45, the U. S. recognized all seamen

employed on ships used by it in the war as seamen of the U. S.; and cut off their rights as compensation employees from the date of said Act; and saved any claim or right which had already accrued. The injury here occurred on 9/14/42 and was not cut off by said Act of 3/24/43.

All of the pregoing facts were alleged in the complaint which the Dist. Court dismissed on motion, and whose order the Court of Appeals affirmed by the judgment to be reviewed. None of the foregoing facts are denied, because none of them can be denied.

**A Direct and Concise Argument Amplifying the Reasons Relied on for the Allowance of the Writ is as Follows:**

## POINT I

**The Appeals Board Acted without jurisdiction in deducting from compensation the items of insurance and wages contracted for and paid by the shipping company; and in refusing to appraise the value of the seaman's maintenance and quarters on board the ship, which it is directed to do by statute.**

It is too clear for argument that the shipping articles contract provided that the conditions of employment and wages, on this most dangerous voyage, should include the bonus insurance against personal injury by enemy action, and also the maintenance as out-patient, and also the wages back to home port.

It is also clear that the only jurisdiction of the Appeals Board in this case is to apply and make decisions under the Employees Compensation Act of Sept. 7, 1916 as amended. As matter of course it has no jurisdiction except as to matters comprised in the Compensation Act.

In all reason and in the nature of things, the prior insurance and wages, which were contracted for, and were

earned, and paid by the shipping company, and were applicable to services rendered before the injury occurred, are not in the same subject matter as workmen's compensation under the Compensation Act of 9/7/1916.

Webster's New International Dict. 1954, defines "wages" as "pay given for labor, usually manual or mechanical, at short stated intervals, as distinguished from salaries or fees".

The same authority defines "Workmen's Compensation Act", as "a statute giving to a workman * * * a right against his employer to a certain compensation on the mere occurrence of an accident".

Note that the above defines workmen's compensation (as under the Act of 9/7/1916) as something given, not paid for, not contracted for, but given by a paternalistic government. Said definition can not be disputed. But the insurance of Rivera is the very antithesis of anything given. It is not at all of the same nature as a gift. The undisputed facts are that in the shipping articles Rivera contracted to take the war risk chances of being injured by enemy action, in consideration of the war insurance and war bonuses as parts of the conditions of his employment, that is, as parts of his wages. Those war risk chances were the premium he paid for the insurance. And it turned out to be a sad and sorry contract for him. The premium he paid for the insurance turned out to be, that he was nearly killed, and he endured very great suffering which still continues, and he has been totally disabled for the rest of his life.

It does not make sense to say that the insurance so contracted for, and so paid for, is in the nature of gift insurance, and in the nature of workmen's compensation as a gift, so that the Appeals Board had jurisdiction over it, to take it away, even though it was contracted and paid by the shipping company, as sole contracting entity,

and it was fully earned on the date of the injury, and applies only to the time extending to the date of the injury, to 9/14/42. The insurance accrued as against the shipping company as matter of right on 9/14/42, when the injury occurred. Compensation against the U. S. could only begin to run from that date.

Said Webster's New International Dict. 1954, defines, "Insurance" as "A contract whereby, for a stipulated consideration, called a premium, one party undertakes to indemnify or guarantee another against loss by a certain specified contingency or peril, called a risk".

The peril here is very plain. Nothing could be more plain than the premium paid, and fully paid, by Rivera, under contract. The fact that he paid in full for the insurance, under contract, takes it entirely out of the subject matter of workmen's compensation, and takes it entirely out of the jurisdiction of the Appeals Board.

Congress has provided, in effect, by its amendment to sec. 7, of the Compen. Act, that "the proceeds of any insurance policy", have no relation to workmen's compensation, and are separate ~~and distinct~~ from, and are not of the same subject matter as, workmen's compensation. Sec. 7 of the Compen. Act (U. S. C. Title 5, sec. 757) provides that in certain cases a beneficiary must elect under which of 2 statutes he shall take. And it provides that "the proceeds of any insurance policy" shall not require any election, because, as the sense is, "the proceeds of any insurance policy" have nothing to do with workmen's compensation. Said section 7 provides:

> "Whenever any person is entitled to receive any benefits under * * * this title by reason of his injury * * * and is also entitled to receive from the United States any payments or benefits (*other than the proceeds of any insurance policy*), by reason of such injury * * * under any other Act of Congress * * *

such person shall elect which benefits he shall receive" (Italics ours.)

In the above provision Congress enacted in substance that the "proceeds of any insurance policy" have nothing to do with workmen's compensation, and are not in the same subject matter as workmen's compensation. Said statute is wholly logical. Because, insurance against a specified peril can not be insurance therefrom, if the proceeds of the insurance can be charged back against the insured on some other account. Note also that under said provision it is not material if the insurance were to be paid by the U. S., which is not the case here; but that shows how absolute is the said statute, to keep workmen's compensation separate and distinct from insurance in any form.

As said by Justice Douglas in *Hust* v. *Moore McCormack*, 328 U. S. 707, 735:

"The shipping articles, however, are by statute required to be an engagement between the master and the crew. 38 Stat. 1168, 46 U. S. C. sec. 735."

The above shows how positive is the law that the seamen shall contract with the captain in the shipping articles, and thru him contract solely with the captain, the vessel, and owner. And in this case, in the shipping articles contract Rivera contracted with the captain and the shipping company for the insurance as part of his wages, and for all of the other items and obligations of the shipping articles.

And the Appeals Board had no jurisdiction over, to deprive the seaman of, the $577.50 of maintenance as an out-patient which was duly paid by the shipping company to the seaman as part of his wages contracted for in the shipping articles, and which was fully earned on the date of injury (Appen. 4). It has long been settled, by this court, that as part of the contract contained in the ship-

ping articles, the shipping company contracts to pay to the seaman as part of the terms and conditions and wages of his employment, maintenance as an out-patient. In *Calmar* v. *Taylor*, 30[illegible] U. S. 525, 527-9 Justice Stone says:

> "The ancient duty of a vessel and her owner to provide maintenance and cure for seamen injured or falling ill while in service * * * *arises from the contract of employment,*" and is not "restricted to those cases where the seaman's employment is the cause of the injury or illness. * * * It is *not an award of compensation for the disability suffered.* * * * The maintenance exacted is comparable to that to which the seaman is entitled while at sea. * * * and 'cure' is care, including nursing and medical attention during such period as the duty continues" (itals. ours).

*In The Progress*, 21 F. Supp. 572, Naterer, D. J., says, p. 573: "The ship's articles constitute a contract between the seaman and the ship for wages, maintenance, and cure of illness during the voyage. After entering upon the voyage, the seaman became entitled as of course, during the voyage to (a) maintenance, (b) cure for illness, (c) wages for the voyage."

And the Appeals Board had no jurisdiction over, to deprive the seaman of, the $624.17 of wages back to home port after the injury, which had been duly contracted for, and paid to the seaman by the U. S. Lines Co. as part of his wages contracted for in the shipping articles (Appen. 4). Said wages of $624.17 were fully earned on the date of injury. They were a part of his wages to the date of injury, when the right thereto accrued. The law is all one way that as matter of contract under the shipping articles a seaman who is injured during the voyage is entitled to be paid by the ship and ship owner his full wages back to home port.

In *Pacific Mail Co.* v. *Lucas*, 264 Fed. 938, Cir. 9, aff'd 258 U. S. 266, Gilbert C. J. p. 941, says:

> "The appellee, having fallen sick on the voyage, was entitled to recover his full wages for the trip for which he was engaged, and the necessary expenses incurred in his cure."

The shipping articles are a "maritime contract" to pay a seaman's wages to the end of the voyage. So held in *Martinez* v. *Matson Co.*, 97 Fed. 2d 19, Cir. 5; also, *Great Lakes Co.* v. *Geiger*, 261 Fed. 275, Cir. 6.

No one would argue that the Appeals Board has power and jurisdiction to set off from workmen's compensation a victory bond which was the property of the seaman. Property contracted for and received as insurance and wages under the shipping articles, from the shipping company as wages for services rendered during the time ending on the date of injury, is in the same class as a victory bond owned by the seaman, in this respect. And the Appeals Board has no jurisdiction over it, to set it off from Compensation and take it away from the seaman. When the Appeals Board set off the insurance, maintenance as an out-patient, and wages back to home port, from the compensation found by it to be due to Rivera, it took from Rivera his property without due process of law contrary to Article V of the U. S. Constitution, and acted without jurisdiction.

The Appeals Board also had no jurisdiction to refuse to appraise the value of the seaman's maintenance and quarters on board the ship before the injury, as part of his pay base (Appen. 5-6). Section 762 (b) of the Compensation Act provides: "The value of subsistence and quarters, and any other form of remuneration in kind for services if its value can be estimated in money, shall be included in the pay" (5 U. S. C. 762, 63 Stat. 862).

The Appeals Board said "Neither the Bureau nor the Appeals Board determine the value of subsistence and quarters" (Appen. 5, Br. in record 21).

The Appeals Board was duly asked to appraise the value of the seaman's subsistence and quarters at from $3 to $4 per day, which is the least value thereof at that time, which has been adjudged in other cases. *Fraser* v. *U. S.*, 72 Fed. Supp. 1, 4, aff'd 167 F. 2d 141 (1944). The Appeals Board simply refused to follow the statute. It merely took the biased letter of some unnamed employee of the U. S. Lines Co. who was apparently an insurance man, that the value of subsistence and quarters was only $1.20 a day, whereas everyone connected with the case knows that the value thereof was at least from $3 to $4 per day (Appen. 6, Br. in record 21). In doing so the Appeals Board acted with characteristic nonchalance under the idea that its action could not be reviewed.

The foregoing shows that the Appeals Board acted outside of its jurisdiction in taking from Rivera the $5,000 insurance, the $577.50 of maintenance as an outpatient, and the $614.17 of wages back to home port; and also when it refused to appraise the value of his maintenance and quarters as part of his wages. That these items were insurance and wages contracted for and paid by the shipping company. And they were all fully earned, and paid, for services rendered before he was injured on 9/14/42.

## POINT II

**The extent of the jurisdiction of the Appeals Board is a matter for judicial determination; and where an agency has acted beyond its jurisdiction the court will reverse said act.**

In *Soc. Sec. Brd.* v. *Nierotko*, 327 U. S. 358, the Board had refused to hold that back pay obtained by the employee thru the Nat. Labor Relations Board, for being wrongfully discharged, was wages under the Soc. Sec. Act to be credited to the Old Age and Survivor's Insurance account of the employee. The refusal by the Board was

reviewed on certiorari and reversed. And it was held that the jurisdiction and power of any agency is to be determined by the courts. Justice Reed, pp. 369-70, says:

"Administrative determinations must have a basis in law and must be within the granted authority. Administration, when it interprets a statute so as to make it apply to particular circumstances, acts as a delegate to the legislative power. * * * An agency may not finally decide the limits of its statutory power. That is a judicial function." * * * (Citing Am. School v. McAnnulty, 187, U. S. 94, 110.)

"We conclude however, that the Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative *routine* and the statutory limits. * * * It is beyond the permissible limits of statutory interpretation" (itals. ours).

In *Am. School* v. *McAnnulty*, 187 U. S. 94 (1902), the Postmaster General, and the postmaster of the City of Nevada, Mo. were depriving the plaintiffs of the use of the mails on the alleged ground that the business conducted by the plaintiffs in magnetic healing and Christian Science was fraudulent. It was held that where an administrative officer does acts which are outside of his jurisdiction as matter of law on the admitted facts, the person injured may enjoin such acts in the federal courts. Justice Peckham, pp. 109-10 says:

"The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General as assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbi-

trary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld."

## POINT III

**The Act of July 28, 1945 does not make any preclusion of court review of the decisions of the Appeals Board, which is applicable to this case.**

In the first place, any statutory preclusion of court review would apply only to where the Board has acted within its statutory jurisdiction. For where an Administrative Board has acted outside of its jurisdiction, its such acts are subject to court review and reversal, irrespective of whether its acts are reviewable when it has acted within its jurisdiction. Where an Administrative Board acts outside of its jurisdiction its act is unlawful, and is subject to court reversal irrespective of whether its acts done within its jurisdiction are reviewable. In the present case the acts done by the Appeals Board in assuming jurisdiction over insurance and wages earned and paid for under contract, from a third party as earned before the injury, are done outside of its jurisdiction, and they are subject to court review for that reason, irrespective of whether acts done by the Appeals Board within its jurisdiction are reviewable.

The only statute which in any way excludes court review of acts done by the Appeals Board within its jurisdiction is the Act of July 28, 1945, 59 Stat. 503. Said act of 7/28/45 does not purport to amend the entire Compen. Act and Title. It expressly states that "section 42 of such act is hereby amended by adding at the end thereof the following new paragraph".

Thus said act of 7/28/45 expressly states that only section 42 of the Compen. Act is amended, and that is, by

adding a new paragraph to said section 42, to provide as contained in said Act of 7/28/45.

In *Healey* v. *Wheeler,* 75 N. H. 214-5, 72 A. 753, the issue was whether an amending statute was intended to amend clause 1 or a descent act or only clause 2 thereof. The court held:

"As Section 1, chapter 113, laws of 1901, purports to amend clause II, there is a presumption that that is the only clause to which the legislature intended it should apply".

Said section 42 of the Compen. Act always, from its beginning, provided exclusively to the administration of the Compen. Act in places outside of the United States. Turning to section 42 of the original Compen. Act, 39 Stat. 750, we find that it applies exclusively to employees of the Panama Canal, and of the Panama Railroad Co. and of the Alaskan Engineering Commission. And it provides that the Compen. Act is to be by order of the President administered as to those employees by the Governor of the Panama Canal, and by the Chairman of the Alaskan Engineering Commission, respectively. Thus said original section 42 the Compensation Commission applies exclusively to administering the Compen. Act in places outside of the U. S. And the Commission was not to administer it in those places.

And to the present time said section 42 of the Compen. Act applies only and exclusively to administering the Compen. Act in places outside of the U. S. Turning to the present U. S. C. of 1952, the Title to said section 42 is as follows: "Transfer of administration to other bodies; regulations as to payment; employees of Canal Zone Government, Panama Canal Company, and Alaska Railroad; appeals; application to noncitizen and nonresident employees". And all of said present section 42 deals exclusively with administering the Compen. Act in

places outside of the U. S. There is nothing in said section 42 which applies to administering the Compen. Act in the U. S. (U. S. C. Title 5, sec. 793).

Such was the context and subject matter of said section 42 when Congress enacted the Act of 7/28/45 adding the new paragraph to said section 42. Said new paragraph treats exclusively with claims of noncitizens and nonresidents for injuries from accidents occurring outside of continental U. S. And it gives to the Commission fullest and completest discretion in administering the Compen. Act by its designees or otherwise with respect to claims of noncitizens and nonresidents for injuries occurring outside of the U. S. And it then provides as part of the same limited subject matter that acts done by the Commission or its designees with respect to claims of noncitizens and nonresidents based on injuries received outside of the U. S. shall not be reviewable by any other official or by any court. There is no provision that any acts done by the Commission with respect to claims of citizens or residents of the U. S. shall not been reviewable. In fact the provisions of the act of 7/28/45 are very contrary to such a contention. The language of said act of 7/28/45 is as follows:

"Whenever the Commission shall find that the amount of compensation * * * payable to employees of the United States who are neither citizens nor residents of the United States, any Territory, or Canada, * * * is substantially disproportionate to compensation * * * which may be payable in similar cases under local law * * * at the place outside the United States, any Territory, or Canada, where such employees may be working at the time of the injury, the Commission may provide for payment of compensation," * * *

1. In accord with prevailing local payments in similar cases.

2. May adopt or adapt local schedules or other local law.

3. May change the amounts and rates payable.

4. May change the beneficiaries.

5. May in cases of such "noncitizens and nonresidents" pay lump sums, and settle disputed claims.

6. May delegate an officer or agency as it deems advisable to process, to adjudge, and pay such claims.

7. May waive the application of the Compen. Act if it finds that conditions prevent the processing of "claims of such noncitizens and nonresidents".

8. May apply "the provisions of this paragraph", retrospectively and with such adjustment "as the Commission may find to be proper."

Then after giving all of the foregoing fullest discretionary powers, but all limited to claim of noncitizens and nonresidents and to the case of injuries received outside of the U. S. the act of 7/28/45 provides for the only exclusion of right of court review, as follows:

> "The action of the Commission or its designees in allowing or denying any payment *under this Act* shall be final and conclusive for all purposes and with respect to all questions of law and fact, and not subject to review by any other official of the United States, or by any court * * * and credit shall be allowed in the accounts * * * for payments in accordance with such action" (itals. ours).

The effect of the judgment to be reviewed is to hold that said Act of 7/28/45 provides that no decision of the Appeals Board even referring to the Compen. Act is subject to court review, and that, too, whether or not the Appeals Board acted within or without its jurisdiction.

It is to be noted that the preclusion sentence of the Act of 7/28/45, includes any action of the "designees" of the

Commission, whereas there are no such designees when the claim is by a citizen. And the exclusion sentence *is interested* as to a review by another official; and *is interested* in having the credit allowed for payments in accordance with such action. These items do not comport with any intent to exclude court review of any and all decisions in any way connected with the entire Compen. Act.

It is clear that the above words "under this Act" (*Act* capitalized) mean, in the prime and reflective sense, under this Act of July 28, 1945. Congress was dealing with the subject matter of claims of noncitizens and nonresidents for injuries received outside the U. S. It was dealing exclusively with this new paragraph added to Section 42. It was not dealing with the whole Compen. Act. Nor with exclusion of court review of all acts done in any way connected with the whole Compen. Act. If Congress had meant to exclude court review of all decisions in anyway referring to the whole Compen. Act, it would have said so in plain language. For plain language is naturally required for such a momentous provision. But, of course, Congress did not intend to exclude court review from any possible decision dealing in any way with the whole Compen. Act, which is long, and is very meticulous, and very precise, and contains many proportions and schedules and figures.

To arrive at said erroneous and false construction of the Act of 7/28/45, and to make, said exclusion of court review apply to the whole Compen. Act the codifiers of the U. S. C. struck out from the Act of 7/28/45 the words "under this Act", and substituted for them the words "under sections 751-756, 757-791 and 793 of this title." The very great extent of the changes made by the codifiers, shows the great violence done to the language and meaning of the Act of 7/28/45. By the codifiers the vords "this Act", are changed to "this title". And by them a great multitude of sections is inserted which are not at all in the Act of 7/28/45.

It is not material that at some places in this new paragraph added to section 42 by the Act of 7/28/45, the word "Act" is used to refer to the whole Compen. Act as a mere reference, and that the codifiers have made the same changes from the language of the Act of 7/28/45, at those other places. It is of no importance that the act of 7/28/45 does sometimes refer to the whole Compen. Act, as a mere reference. Nothing turns on that. But at the place in issue, Congress accompanies the fullest discretion pointed out above in cases of claims of noncitizens and nonresidents for injuries occurring outside of the U. S., with preclusion from court review as to those matters only. Preclusion of court review of all matters passed on by the administrative Commission, is a shocking matter and of utmost concern and importance. It is not to be inferred or implied that Congress enacted a preclusion from court review of any and all matters connected with the entire meticulous Compen. Act, and that Congress did so on the sly, in a veiled way, in providing for this natural preclusion from court review in those matters in which fullest discretion is most forcibly stated, in dealing with claims of noncitizens and nonresidents based on injuries received outside of the U. S.

It is clear that the Act of 7/28/45 is still the law, and not the changes made by the codifiers (U. S. C. Title 1, secs. 112, 204).

The foregoing shows that there is no preclusion of court review of Acts of the Appeals Board which is applicable to this case. But if there were such a preclusion, still it did not extend to the acts here done by the Appeals Board outside of its jurisdiction in taking from the seaman the insurance and wages earned by him from, and paid to him by, a third party, that is, the shipping company, for services fully performed before the date of injury on 9/14/42. And in refusing to appraise the value of his maintenance and quarters, which is expressly directed by statute (U. S. C. Title 5, sec. 762(b)).

## POINT IV

**Reasons relied on for allowance of the writ.**

1. The Appeals Board acted outside of its jurisdiction in setting off the paid for insurance and contract wages earned from, and paid by, the shipping company, for services before the injury, from compensation found by it to be due to the seaman petitioner under the Act of Sept. 7, 1916 (Appen. 3).

2. The Court of Appeals (and the Dist. Court) held in substance although not in words, that the court had no jurisdiction to review these acts of the Appeals Board even though the Appeals Board acted outside of its jurisdiction in making said set-offs.

3. Both of the courts below refused wholly to discuss all issues of jurisdiction.

4. The Court clearly has jurisdiction to reverse acts of the Appeals Board done outside of its jurisdiction.

5. There is no preclusion of Court review of acts of the Appeals Board done inside of its jurisdiction, except acts done in cases of claims of noncitizens and nonresidents based on injuries received outside of the United States as provided in the Act of 7/28/45.

6. The Act of 7/28/45 provides the only preclusion from court review of decisions of the Appeals Board, and that preclusion is limited to cases of claims of noncitizens and nonresidents based on injuries received outside of the U. S.

The Appeals Board had no jurisdiction to refuse to appraise the value of subsistence and quarters because the statute directs that it do so and include the value in the monthly pay (Appen. 5-6, supra 16).

The Per Curiam order of the Court of Appeals says:

"He brought this action because the appellees denied part of his claim under the Federal Employee's Compensation Act."

Said statement misstates the cause of action. The action is brought because the Appeals Board took away from plaintiff the insurance and wages which he had earned from, and which were paid by, the shipping company, a third party, for services rendered before the injury, and the Appeals Board acted outside of its jurisdiction. And because the Appeals Board refused to appraise the value of his maintenance and quarters, which is expressly required by the statute (Appen. 1-8).

Under rule 19 of this court the Court of Appeals has erroneously decided important questions of federal law which have not been, but should be, settled by this Court.

Wherefore your petitioner prays that under Rule 25 of this Court an order be made granting this petition for certiorari, and that the clerk notify the court below and counsel of record of the granting of this petition, and that said order direct that the certified transcript of record on file here be treated as though sent up in response to a formal writ.

Dated Aug. 15, 1957.

Respectfully submitted,

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# APPENDIX

## Judgment to be Reviewed

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 13680

[Same Title as on Record Below]

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Appeal from the United States District Court for the District of Columbia

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Decided May 29, 1957

*Mr. Jesse L. Rosenberg,* of the bar of the Court of Appeals of New York, pro hac vice, by special leave of Court, with whom *Mr. William C. Koplovitz* was on the brief, for appellant.

*Mr. Herbert E. Morris,* Attorney, Department of Justice, of the bar of the Supreme Court of Connecticut, pro hac vice, by special leave of Court, with whom *Assistant Attorney General Doub* and *Messrs. Oliver Gasch,* United States Attorney, and *Melvin Richter,* Attorney, Department of Justice, were on the brief, for appellees. *Mr. Lewis Carroll,* Assistant United States Attorney, also entered an appearance for appellees.

Before EDGERTON, *Chief Judge,* and WILBUR K. MILLER and DANAHER, *Circuit Judges.*

PER CURIAM: The plaintiff was injured by enemy action in 1942, when he was a seaman on a ship of the United States Lines Company. He brought this action because the appellees denied part of his claim under the Federal Employees' Compensation Act. The District Court correctly dismissed the complaint for lack of jurisdiction. § 42 of the Act as amended, 59 Stat. 503, 504, 5 U.S.C. § 793.

*Affirmed.*